REDACTED DECISION -- 06-176 HP -- BY R. MICHAEL REED, CHIEF ALJ -- SUBMITTED for DECISION on JANUARY 22, 2007 -- ISSUED on JUNE 25, 2007

SYNOPSIS

BROAD-BASED HEALTH CARE PROVIDER TAX -- TAX CREDIT FOR CERTAIN MEDICAL MALPRACTICE INSURANCE PREMIUMS -- CREDIT NOT ALLOWABLE UNDER CLEAR WORDING OF STATUTE WHEN PREMIUMS PAID DURING TAXABLE YEAR ENDING AFTER DECEMBER 31, 2003 -- The tax credit provided by W. Va. Code § 11-13T-1 [2003] *et seq.* for certain medical malpractice insurance premiums -- which credit is applicable against the broad-based health care related tax on physician services imposed by W. Va. Code § 11-27-16 [1993] -- is not allowable, under the clear wording of W. Va. Code § 11-13T-4(a)(2) [2003], when, as here, the premiums are paid during a taxable year ending after December 31, 2003.

RESORT TO STATUTORY HISTORY OR OTHER STATUTORY CONSTRUCTION NOT PROPER WHEN STATUTE CLEAR -- When a tax statute, as here, is clear and free from ambiguity, it will be applied and not construed, without resort to, for example, legislative history.

OFFICE OF TAX APPEALS LACKS AUTHORITY UNDER STATE CONSTITUTION TO INVALIDATE STATUTE AS FACIALLY DENYING EQUAL PROTECTION -- Being a part of the executive branch of state government, the West Virginia Office of Tax Appeals is precluded by the "Division of Powers" Clause, W. Va. Const. art. V, § 1, from declaring that a statute is unconstitutional on its face.

BROAD-BASED HEALTH CARE PROVIDER TAX -- ADDITIONS TO TAX WAIVED -- GOOD-FAITH LEGAL CHALLENGE -- The West Virginia Office of Tax Appeals will waive regular additions to tax imposed, under W. Va. Code § 11-10-18(a)(2) [1986, 2006], for late payment, when, as here, the taxpayer shows that the

delinquency was due to a good-faith legal challenge involving, for example, the correct manner of applying a statute.

FINAL DECISION

The following findings of fact and procedural history are based upon the parties' written "Stipulation of Facts":

FINDINGS OF FACT and PROCEDURAL HISTORY

1. The primary Petitioner, "A," is a health care provider which provides its services in and near a certain county in West Virginia, and is subject to the West Virginia broad-based health care provider tax (also called the broad-based health care related tax), specifically, for purposes of this matter, such tax on the provision of physician services, imposed by W. Va. Code § 11-27-16 [1993].

2. During the time period involved in this matter, the secondary Petitioner, "B," also was a health care provider which also provided its services in and near the same county in West Virginia as "A," and was subject to the West Virginia broad-based health care provider tax on physician services.

3. During the year 2003 the Petitioners consummated a reorganization and contractual operation agreement under which various assets, including state and federal tax credits available to "B" were to be available to "A," as the successor operating entity.

4. On May 1, 2003, the Petitioners purchased and paid for a "tail insurance" type of medical malpractice liability insurance policy having a total combined annual premium cost of $.

5. On June 28, 2005, Petitioner "A" timely filed its amended annual return of broad-based health care related tax for the fiscal and tax year ended March 31, 2004. In this return the Petitioner "A" claimed a tax credit for combined annual medical liability insurance premiums paid of $.

6. The parties agree that the latter amount is the correct amount of the tax credit, if that credit is lawfully allowable to Petitioner "A."

7. On January 15, 2006, the Excise Tax Unit of the Internal Auditing "Division" of the West Virginia State Tax Commissioner's Office ("the Commissioner" or "the Respondent") issued a broad-based health care provider tax assessment against the Petitioner "A." This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 27 of the West Virginia Code. The assessment was for the fiscal and tax year ended March 31, 2004, for tax of $, interest, through January 15, 2006, of $, and additions to tax of $ (for late payment), for a total assessed tax liability of $. Written notice of this assessment was served on the Petitioner "A" on or about January 19, 2006.

8. The assessment was based exclusively upon the view that the claimed tax credit was not allowable to Petitioner "A" because the medical malpractice insurance premiums in question were paid during a tax year which ended after December 31, 2003.

9. Thereafter, by mail postmarked February 28, 2006 (received on March 01, 2006), the Petitioner "A" timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2005]. In the petition for reassessment the Petitioner "A" asserted the validity of the tax credit claimed in the amended return for the medical malpractice

insurance premiums paid on May 01, 2003, and asserted the resulting total invalidity of the assessment.

10. Subsequently, notice of a prehearing conference and of a later evidentiary hearing on the petition was sent to the Petitioner "A" in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

11. However, after the prehearing conference was conducted before this tribunal, the parties decided to submit this matter for decision on stipulated facts and briefs, without an evidentiary hearing in person.

12. After all of the briefs had been submitted, the Petitioner "A" initially requested that this tribunal hold its decision in abeyance, to permit each of the Petitioners ("A" and "B") the opportunity to file a new amended tax return by a certain date, which new amendment would render the assessment "moot," due to the credit's being claimed therein by "B," a calendar year taxpayer.

13. However, both Petitioners ultimately decided not to file a new amended tax return and, instead, requested (in writing), again, that this tribunal decide the matter on the existing record.

DISCUSSION

Analysis of Statute

The first issue is whether the Petitioner "A" properly claimed the tax credit for medical malpractice insurance premiums paid on May 01, 2003, for that Petitioner's taxable year ended March 31, 2004. This tribunal holds in the negative, due to the clearly worded applicable statutory limitation on claiming (qualifying for) the tax credit.

The pivotal statutory language in this matter is set forth in W. Va. Code § 11-13T-4(a)(2) [2003], which provides as follows: "This credit may be taken for combined annual medical liability insurance premiums **paid** [emphasis by Petitioner-taxpayer] during any taxable year beginning on or after the first day of January, two thousand two, and ending on or before the thirty-first day of December, two thousand three [emphasis by Respondent State Tax Commissioner]."

The Petitioner-taxpayer "A" argues that the tax credit is allowable if the premiums were, as here, paid during the time period between January 01, 2002 and December 31, 2003. Stated alternatively, the Petitioner "A" argues that W. Va. Code § 11-13T-4(a)(2) [2003] "is a limitation as to the time period during which a taxpayer could qualify for the credit by obtaining insurance and paying the qualified combined annual medical liability insurance premiums within the said time period." Petitioner "A"'s Initial Memorandum of Law, at 7. Thus, in the opinion of the Petitioner "A," W. Va. Code § 11-13T-4(a)(2) [2003] "is not a limitation on the taxable year for which the credit otherwise qualified for can [*sic*; may] be asserted[.]" *Id.*, at 8.

In contrast, the State Tax Commissioner argues that the credit is allowable if, as the statute explicitly provides, the premiums were, unlike here, paid during a taxable year commencing no earlier than January 01, 2002, and ending no later than December 31, 2003 (the tax year in question here ended on March 31, 2004).

The Commissioner is correct in this regard, for W. Va. Code § 11-13T-4(a)(2) [2003] sets forth a very limited period of time to qualify for that tax credit.

To support its argument the Petitioner "A" points to legislative history involving an earlier enacted, similar tax credit statute, for other medical malpractice insurance

premiums, which statute is worded somewhat differently (more succinctly, for sure). W. Va. Code § 11-13P-11 [2001] provides: "No credit shall be allowed under this article for any taxable year ending after the thirty-first day of December, two thousand four." The Petitioner "A" contends that the use of different language in W. Va. Code § 11-13T-4(a)(2) [2003], compared with that in W. Va. Code § 11-13P-11 [2001], implies that the Legislature in enacting W. Va. Code § 11-13T-4(a)(2) [2003] was not concerned with the taxable year in which the premiums were paid (despite the explicit use of the words "taxable year" in both of these statutes), as long as the premiums were paid during the period of time stated, that is, between January 01, 2002 and December 31, 2003.

With respect to this point about these allegedly comparable tax credit statutes, this tribunal has two observations. First, the taxpayer is comparing W. Va. Code § 11-13P-11 [2001] inappropriately with W. Va. Code § 11-13T-4(a)(2) [2003], as these two statutes address different subjects. The former addresses the final point in time for termination of that other tax credit -- any unused portion of which, each year, is forfeited and may not, each year, be carried back or carried forward, *see* W. Va. Code § 11-13P-5 [2001]. In contrast, W. Va. Code § 11-13T-4(a)(2) [2003] addresses the limited period of time for qualification for the tax credit involved here -- premiums paid during any "tax year" beginning on or after January 01, 2002 and ending on or before December 31, 2003. The comparable termination statute here is W. Va. Code § 11-13T-5 [2003], which authorizes a carry forward each year (no carry back) of any unused article 13T tax credit, until the final point in time for termination (and forfeiture) of this tax credit, which is July 01, 2010.

Second, and more importantly, the taxpayer is attempting to create an ambiguity in, and the resulting "need" for construction (interpretation) of, what is actually a clearly (unambiguously) worded statute itself -- by resorting to legislative history involving another statute. "Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it." *Deller v. Naymick*, 176 W. Va. 108, 112, 342 S.E.2d 73, 77 (1985); *Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970). In addition, "[t]hat the parties disagree as to the meaning or the applicability of [a statutory] provision does not of itself render [the] provision ambiguous or of doubtful, uncertain or obscure meaning." *Trustees of Firemen's Fund v. City of Fairmont*, 215 W. Va. 366, 370, 599 S.E.2d 789, 793 (2004); *Deller v. Naymick*, 176 W. Va. 108, 112, 342 S.E.2d 73, 77 (1985); *Estate of Resseger v. Battle*, 152 W. Va. 216, 220, 161 S.E.2d 257, 260 (1968).

Instead, the applicable principles related to the appropriateness of statutory construction in this matter are as follows. "'[T]ax law is a creature of statute and it is the statute which determines the issue. It is well settled in this State that when a tax statute [as here] is clear and free from ambiguity, it will be applied and not construed.' *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523, V.F.W.*, 147 W. Va. 645, [649-50,] 129 S.E.2d 921, 924 (1963); *J. D. Moore, Inc. v. Hardesty*, 147 W. Va. 611, [615,] 129 S.E.2d 722, 724-25 (1963)." *West Virginia Tractor & Equip. Co. v. Hardesty*, 167 W. Va. 511, 516, 280 S.E.2d 270, 274 (1981). Also, this principle is stated in a more general fashion: "Where [as here] the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. pt. 3, *B B Enter., Inc. v. Palmer*, 214 W. Va. 571, 591 S.E.2d 129 (2003); Syl. pt. 4, *Consol.*

Natural Gas Co. v. Palmer, 213 W. Va. 388, 582 S.E.2d 835 (2003); Syl. pt. 4, *Syncor Intern'l Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001); *Habursky v. Recht*, 180 W. Va. 128, 132, 375 S.E.2d 760, 764 (1988); Syl. pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).

Constitutional Challenge

The next issue is whether W. Va. Code § 11-13T-4(a)(2) [2003] on its face denies equal protection, in violation of the Article III, Section 10, of the *Constitution* of this State, if it is held that that statute, by its explicit terms, denies the tax credit in question to a fiscal year taxpayer whose fiscal year ends after December 31, 2003, but allows the credit to a calendar year taxpayer, when the payment of the medical malpractice insurance premium, triggering the credit, by both taxpayers, occurs on the same date prior to the end of the calendar year. This tribunal holds that it is without the authority, under the *Constitution* of this State, to address this issue.

Article V, Section 1, of the *Constitution* of this State, on the "Division of Powers," precludes this executive-branch tribunal from declaring that a statute is unconstitutional on its face. Only a court within the judicial branch of government has that authority.

Additions to tax

The final issue is whether the regular additions to tax (for late payment) should be waived in this matter. This tribunal holds in the affirmative.

W. Va. Code § 11-10-18(a)(1)-(2) [1986, 2006] authorizes the additions to tax imposed for late filing of a state tax return, or for late payment of the state tax, or imposed for both late filing and late payment, to be waived, if the taxpayer shows that the delinquency was "[1] due to reasonable cause and [2] not due to willful neglect[.]" Due to the good-faith legal challenge raised by the Petitioner-taxpayer in this matter, this tribunal waives the additions to tax which were assessed here.

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. The tax credit provided by W. Va. Code § 11-13T-1 [2003] *et seq.* for certain medical malpractice insurance premiums -- which credit is applicable against the broad-based health care related tax on physician services imposed by W. Va. Code § 11-27-16 [1993] -- is not allowable, under the clear wording of W. Va. Code § 11-13T-4(a)(2) [2003], when, as here, the premiums are paid during a taxable year ending after December 31, 2003.

2. When a tax statute, as here, is clear and free from ambiguity, it will be applied and not construed, without resort to, for example, legislative history.

3. Being a part of the executive branch of state government, the West Virginia Office of Tax Appeals is precluded by the "Division of Powers" Clause, W. Va. Const. art. V, § 1, from declaring that a statute is unconstitutional on its face.

4. The West Virginia Office of Tax Appeals will waive regular additions to tax imposed, under W. Va. Code § 11-10-18(a)(2) [1986, 2006], for late payment, when, as

here, the taxpayer shows that the delinquency was due to a good-faith legal challenge involving, for example, the correct manner of applying a statute.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the broad-based health care provider tax (also called the broad-based "health care related tax") assessment issued against the Petitioner "A" for the tax year ended March 31, 2004 , for tax of $, interest, through January 15, 2006, of $, and additions to tax of $, totaling $, should be and is hereby **AFFIRMED** as to the **tax** of $ and **interest, through January 15, 2006,** of $, for a **total liability** (**through January 15, 2006**) of **$**; the **ADDITIONS** to tax in the amount of **$** are, however, **VACATED** in full.

Pursuant to the provisions of W. Va. Code § 11-10-17(a) [2002], **interest continues to accrue** on the affirmed tax portion of the assessment until this liability is fully paid.